

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES ANTHONY DIESSO,

Petitioner, No. CIV S-03-2485 LKK KJM P

vs.

KNOWLES, Warden,

Respondent. FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He challenges his Solano County conviction for murder, possession of a weapon by a prisoner, battery by a prisoner, the findings that he had two prior serious felony convictions and that he had served a prior prison term as well as the resulting sentence of 135 years to life.

I. Background

The state Court of Appeal's thorough factual summary is fairly supported by the record:

Guilt Phase

During the guilt phase of the trial, the prosecution presented the following testimony. In June 1998, defendant was a prisoner at CMF and was housed in the "T" wing in cell 308 with Jeffrey Ford.

1 The I wing houses prisoners with a psychiatric history who have  
2 had problems in the prison system. On June 29, just before 4:00  
3 a.m., Lieutenant Michael Ross found defendant in his cell banging  
4 on the door and saying something Ross could not understand; the  
5 cell was dark and Ross had a hard time seeing inside. He saw what  
6 appeared to be blood on defendant's forehead. Defendant moved  
7 away from the cell door and Ross saw him grab his cellmate and  
8 toss him off the lower bunk and into the wall, after which Ford fell  
9 on the floor. Defendant said, "Get it out of here."

10 Ross testified that when defendant was taken out of the cell, he was  
11 covered in blood and had a "wide-eyed look." Investigating  
12 officers entered the cell and found that Ford was dead; his body  
13 was lying face down against the wall. There were bloody  
14 handprints all over the walls and trash and other items strewn about  
15 the cell. The autopsy revealed that Ford died from ligature  
16 strangulation and blunt force trauma to the head.

17 Later on the same day, June 29, 1998, two other incidents occurred. First,  
18 after defendant was removed from his cell in the early morning he was  
19 placed in a medical examination room, where the correctional officers  
20 decided to change his restraints. In the course of the transfer of the  
21 handcuffs, defendant broke away and hit one of the officers in the face,  
22 knocking him down and knocking another officer into the wall. Both were  
23 briefly rendered unconscious. In the afternoon, two officers from the  
24 Investigative Services Unit went to talk to defendant. They found two  
25 other officers trying to persuade defendant to give up a razor blade he had  
26 in his possession. Instead, defendant took the razor blade, wrapped some  
plastic around it, placed it in his mouth, took a drink from a milk carton  
and swallowed the razor blade.

Defendant made several statements about these incidents. On July  
3, 1998, he told one officer that he was "trippin" and "that was not  
him," but he did not say to which incident he was referring. Also  
on July 3, he told another officer that he did not recall what  
happened on the day of the murder, but only remembered being  
escorted down the hallway from his cell with blood all over him.  
On July 7, a correctional officer overheard defendant talking with  
another inmate, Nicholas Mecca. Defendant bragged about  
swallowing the razor blade and bragged that he had sent two  
officers to the hospital.

In late December 1998, defendant asked to speak to the  
Investigative Services Unit and requested an interview with the  
District Attorney's office. In January 1999, he provided a written  
confession and verbally confessed, giving details of the murder of  
his cellmate Jeffrey Ford.

Several inmates testified about defendant's behavior both before  
and after Ford's murder. James Deckard had previously been  
defendant's cellmate, and had asked to be moved because

1 defendant kept Deckard up all night talking to himself, and  
2 walking around. Deckard thought defendant was not in control of  
3 his faculties. He testified that when defendant was not receiving  
4 his medication, he was uncontrollable. Before the murder  
5 defendant told Deckard that he was planning on killing another  
6 inmate by choking him, and that he intended to put blood and  
7 satanic signs on the wall so that he would be sent to the mental  
8 hospital at Atascadero based on a not guilty by reason of insanity  
9 verdict. Deckard also testified that defendant had a tattoo saying  
10 "NLR" which stood for "Nazi Low Riders," a person "that doesn't  
11 like any other race but himself." However, Deckard did not think  
12 that defendant was affiliated with that group.

13 Another inmate, Ray Ochoa, had been housed with defendant on  
14 previous occasions before Ford was killed. Ochoa testified that  
15 defendant had mood changes, talked to himself and walked around  
16 aimlessly. On one occasion defendant told Ochoa he was dressing  
17 like a girl in order to make himself appear mentally ill. He also  
18 told Ochoa how to swallow razor blades, how to go on a hunger  
19 strike, how to overdose on medication and how to otherwise fake  
20 symptoms of mental illness. Defendant said he was going to kill  
21 an inmate called Stephanie by strangling him and that he would go  
22 to the mental hospital afterwards because he was going to put  
23 things on the wall with blood and act crazy. Ochoa testified that on  
24 the night of the killing, defendant was trying to get the officers's  
25 attention and the officer did not respond to him. Ochoa saw  
26 defendant come out of his cell the night of the murder, and he  
testified that defendant seemed "out of it."

1 A third inmate, Nicholas Mecca, was housed in the Administrative  
2 Segregation wing of CMF when defendant was housed there after  
3 June 29. Mecca testified that defendant told him he had killed a  
4 "punk," meaning a homosexual. He asked Mecca to testify that he  
5 (defendant) was "having psych problems" and was crazy. He told  
6 Mecca that the killing did not have anything to do with  
7 psychological problems and that he never had a psychotic break,  
8 but he wanted Mecca to help him make it seem that was what had  
9 happened. Mecca testified that a few days before the killing,  
10 defendant told him he was going to kill a punk with a razor blade  
11 he had received from another inmate. At some point in time  
12 defendant told Mecca that "he was gonna do it" in order to become  
13 a Nazi Low Rider.

14 During the guilt phase, the defense called two mental health  
15 experts. Dr. Dean Clair, a psychologist, reviewed records but was  
16 unable to meet with defendant because he refused to submit to an  
17 interview. In May 1997, Dr. Clair had interviewed defendant for a  
18 prior offense and had concluded at that time that defendant was *not*  
19 psychotic. Based on his past contact with defendant and on the  
20 files he reviewed for the current offense, Dr. Clair's opinion was  
21 that as of the date of the current offense defendant *was* psychotic as

1 a result of an organic mental disorder. Dr. Clair's opinion was  
2 based in part on defendant's history of seizure disorder with  
3 blackouts, resulting from childhood brain trauma.

4 Dr. Herb McGrew, the second mental health expert called by the  
5 defense, was appointed by the court to evaluate the defendant. Dr.  
6 McGrew, a psychiatrist, had evaluated defendant once for a prior  
7 offense and twice for the current offense. The first time he  
8 evaluated defendant, in 1997, Dr. McGrew found him incompetent  
9 to stand trial, and defendant was sent to Atascadero. As to the  
10 current offense, Dr. McGrew's opinion was that defendant "was  
11 extremely and extraordinarily disturbed" and likely psychotic at the  
12 time of the murder. However, Dr. McGrew also testified that he  
13 felt that defendant was manipulative, and he questioned whether  
14 defendant was giving accurate information.

15 Defense counsel argued that at the time of the murder defendant  
16 was suffering from a mental disease or defect that rendered him  
17 incapable of forming the requisite intent to commit murder. The  
18 jury found defendant guilty on all counts. At the reading of the  
19 verdicts defendant made a verbal outburst and pushed over counsel  
20 table, and was removed from the courtroom.

21 Sanity Phase

22 The parties stipulated that the jury could consider all of the guilt  
23 phase evidence during the sanity phase. At the sanity phase the  
24 same doctors returned to the stand. Dr. Clair testified that in his  
25 opinion defendant was legally insane at the time of the murder. He  
26 based his opinion in part on the fact that defendant suffered from a  
convulsive disorder, and people with such disorders often have  
uncontrollably violent episodes in which they lose the ability to  
distinguish right from wrong. Moreover, defendant had a history  
of instability and violent acting out and might not have been taking  
his medication. The fact that defendant killed his cellmate "under  
circumstances where it would be inescapable that he would be  
charged with that" suggested an inability to link behavior and  
consequences. He found defendant's behavior in general to be  
totally irrational. He also noted that in the period leading up to the  
crime, defendant had been telling others that voices were  
tormenting him. From the fact that defendant acted coherently  
both before and after the murder, Dr. Clair concluded that  
defendant is "transiently psychotic." He opined that all indications  
were that defendant was not in control of himself at the time of the  
murder.

27 Dr. McGrew also testified that defendant was legally insane at the  
28 time of the murder. He believed that at the time of these offenses  
29 defendant was not capable of making any rational decision about  
30 whether killing Ford was right or wrong. The prosecutor suggested  
31 the murder was rational because it was gang-related. Dr. McGrew

1 could only guess that defendant did not commit the murder for  
2 gang-related reasons, but because he was out of control.  
3

4 The defense called Dr. Stephen Estner, a board certified  
5 psychiatrist, appointed by the court. Based on his examination of  
6 defendant and his review of the records Dr. Estner concluded that  
7 at the time of the murder defendant met the criteria for legal  
8 insanity in that he was unable to distinguish right from wrong. Dr.  
9 Estner also testified that people with mental illness can fluctuate to  
10 the point where they are lucid before and after a crime but insane at  
11 the time the crime is committed.  
12

13 Michael Pappa, a captain with the Department of Corrections,  
14 testified for the prosecution about defendant's arraignment hearing,  
15 during which appellant lunged at his attorney and "head-butted"  
16 him, and then spit on the bailiff. The court had defendant removed  
17 from the public courtroom and held in a secure cell adjacent to the  
18 courtroom, where the court questioned defendant, who did not  
19 respond to the court's questions. A week later, the court again  
20 attempted to arraign defendant, who once again refused to speak.  
21 When the court explained it could not accept defendant's not guilty  
22 by reason of insanity plea unless defendant personally entered the  
23 plea, defendant responded to the court's questions and entered his  
24 plea.  
25

26 Officer Fermin Rubio testified to an incident in 1997 where  
27 defendant stabbed another inmate 17 times because the inmate had  
28 called defendant "a snitch." Rubio testified that the inmate had the  
29 reputation as an "effeminate homosexual." He also testified to an  
30 in-court incident in April 1999, where defendant lunged at and  
31 attempted to assault his attorney.  
32

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34 Answer, Ex. A (Court of Appeal opinion) at 3-8.  
35

## 36 II. Standards Under The AEDPA

37 An application for a writ of habeas corpus by a person in custody under a  
38 judgment of a state court can be granted only for violations of the Constitution or laws of the  
39 United States. 28 U.S.C. § 2254(a). Federal habeas corpus relief also is not available for any  
40 claim decided on the merits in state court proceedings unless the state court's adjudication of the  
41 claim:  
42

43 (1) resulted in a decision that was contrary to, or involved an  
44 unreasonable application of, clearly established federal law, as  
45 determined by the Supreme Court of the United States; or  
46

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

3 28 U.S.C. § 2254(d) (referenced herein in as “§ 2254(d)” or “AEDPA”). See Ramirez v. Castro,  
4 365 F.3d 755, 773-75 (9th Cir. 2004) (Ninth Circuit affirmed lower court’s grant of habeas relief  
5 under 28 U.S.C. § 2254 after determining that petitioner was in custody in violation of his Eighth  
6 Amendment rights and that § 2254(d) does not preclude relief); see also Lockyer v. Andrade, 538  
7 U.S. 63, 70-71 (2003) (Supreme Court found relief precluded under § 2254(d) and therefore did  
8 not address the merits of petitioner’s Eighth Amendment claim).<sup>1</sup> Courts are not required to  
9 address the merits of a particular claim, but may simply deny a habeas application on the ground  
10 that relief is precluded by 28 U.S.C. § 2254(d). Lockyer, 538 U.S. at 71 (overruling Van Tran v.  
11 Lindsey, 212 F.3d 1143, 1154-55 (9th Cir. 2000) in which the Ninth Circuit required district  
12 courts to review state court decisions for error before determining whether relief is precluded by  
13 § 2254(d)). It is the habeas petitioner’s burden to show he is not precluded from obtaining relief  
14 by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

15 The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are  
16 different. As the Supreme Court has explained:

17 A federal habeas court may issue the writ under the “contrary to”  
18 clause if the state court applies a rule different from the governing  
19 law set forth in our cases, or if it decides a case differently than we  
20 have done on a set of materially indistinguishable facts. The court  
21 may grant relief under the “unreasonable application” clause if the  
state court correctly identifies the governing legal principle from  
our decisions but unreasonably applies it to the facts of the  
particular case. The focus of the latter inquiry is on whether the  
state court’s application of clearly established federal law is

<sup>1</sup> In Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000), the Fourth Circuit Court of Appeals held in a § 2254 action that “any independent opinions we offer on the merits of constitutional claims will have no determinative effect in the case before us . . . At best, it is constitutional dicta.” However, to the extent Bell stands for the proposition that a § 2254 petitioner may obtain relief simply by showing that § 2254(d) does not preclude his claim, this court disagrees. Title 28 U.S.C. § 2254(a) still requires that a habeas petitioner show that he is in custody in violation of the Constitution before he or she may obtain habeas relief. See Lockyer, 538 U.S. at 70-71; Ramirez, 365 F.3d at 773-75.

objectively unreasonable, and we stressed in Williams [v. Taylor, 529 U.S. 362 (2000)] that an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8 (2002).

The court will look to the last reasoned state court decision in determining whether the law applied to a particular claim by the state courts was contrary to the law set forth in the cases of the United States Supreme Court or whether an unreasonable application of such law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S. 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court must perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other words, the court assumes the state court applied the correct law, and analyzes whether the decision of the state court was based on an objectively unreasonable application of that law.

It is appropriate to look to lower federal court decisions to determine what law has been "clearly established" by the Supreme Court and the reasonableness of a particular application of that law. See *Duhaim v. Ducharme*, 200 F.3d 597, 598 (9th Cir. 1999).

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1     III. Petitioner's Request To Represent Himself

2       A. Background

3           During the course of pretrial proceedings, petitioner filed several Marsden<sup>2</sup>  
4 motions to relieve his series of appointed lawyers and several Farella<sup>3</sup> motions seeking to  
5 represent himself. CT 45-50, 55-60, 64-69 (Marsden motions); CT 75-79, 82-85, 89-93 (Farella  
6 motions). The court gave petitioner a written advisement, which petitioner filled out and filed  
7 with the court. In it petitioner acknowledges his understanding of his legal rights, the advantages  
8 of having a lawyer, the disadvantages of self-representation, and the nature of the charges and the  
9 possible consequences. CT 105-109 (Farella advisement and waiver). At the hearing on  
10 February 28, 2000, the court reviewed these topics with petitioner, who affirmed his  
11 understanding of the problems attendant upon self-representation. 2/28/00 RT 4-9. The court  
12 warned petitioner that "if you represent yourself and then you engage in the acting-out behavior  
13 which unfortunately you have done time and time again, that you'd be removed from the  
14 courtroom, and there's not going to be anybody here to represent you." 2/28/00 RT at 5. Later,  
15 the court asked petitioner "what can you tell me to cause me to believe you when you tell me you  
16 are not going to act out in the future?" Petitioner said:

17           Well, just my word and the fact that I've – I have acted  
18           inappropriately in your courtroom, but at the same time, I realize it  
19           hasn't done any good for me. If anything, it's made things worse,  
          and I'm not planning on trying to make anything worse than they  
          already are.

20 2/28/00 RT 9. The prosecutor objected "primarily based on his disruptiveness." Id. Defense  
21 counsel also urged the court not to grant the motion because of "the complicated nature of this  
22 case, there's also an NGI defense . . ." 2/28/00 RT 10. Petitioner interjected that his "behavior  
23 in court and what takes place in prison is two separate different things." Id. at 11. The court  
24 mused that it "want[ed] to make sure that we give Mr. Diesso all his constitutional rights and not

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26           <sup>2</sup> People v. Marsden, 2 Cal.3d 118 (1970).

3           <sup>3</sup> Farella v. California, 422 U.S. 806 (1975)

1 just the one that talks about representing himself. I want to make sure that he has a fair and  
2 impartial shot at this whole situation.” Id. at 12. Once again, petitioner interjected:

3 If the Court feels uncomfortable with me being in here, if I were to  
4 represent myself, I can always be placed in the holding tank, and I  
5 can hear just as very clearly as if I was standing here. And the  
6 bailiff can run the papers back and forth, because they’ve done that  
7 on other cases where there was disruptions in other courtrooms  
8 where the person that went pro per. So I feel that if that is the  
9 issue, I can – I have no problem being placed in there or being put  
10 on the electric belt or whatever makes the Court happy.

11 Id. at 12-13. The court then ruled:

12 As I say, you know, we are trying to balance your constitutional  
13 rights to represent yourself and trying to balance whether or not  
14 this is the best thing for you and whether or not it’s something that  
15 the Court should allow.

16 The concern the Court obviously has is the fact that, in this Court’s  
17 opinion, the best predictor of future behavior is past behavior. We  
18 have a situation where even in the CDC, which is a very highly  
19 controlled environment and much safer for everybody than this  
20 courtroom, you have not conducted yourself according to the rules.

21 While in my court on several occasions, you’ve acted out and  
22 attempted to assault your attorney. You’ve been violent. I’ve had  
23 to remove you from the courtroom and place you in the holding  
24 cell next to my courtroom, and you acted out so much there, if  
25 memory serves correctly, we had to remove you from this floor, so  
26 we could conduct further hearings in your case.

27 You have acted out in such a way that I don’t find your statement  
28 that you will not act out in the future to be credible. I find based  
29 upon my personal observations of you that you engage in  
30 purposeful behavior when you believe it somehow is going to  
31 benefit you. And it’s this Court’s opinion that your acting out has  
32 been entirely based upon your own specific intent to disrupt this  
33 court and to build error into the record.

34 To allow you to represent yourself would be, in this Court’s  
35 opinion, a huge mistake. It’s obvious that you are not competent to  
36 represent yourself. If you take the records in these proceedings  
37 since they began in its entirety, they clearly demonstrate that you  
38 are not competent to represent yourself. I’m satisfied clearly that  
39 you are mentally competent and that you’ve been fully informed of  
40 your right to counsel. But I’m not satisfied that you really  
41 understand what I’ve told you and what the consequences of your  
42 contemplated act to represent yourself are.

1 I specifically find that you have not intelligently and voluntarily  
2 waived your right to counsel, and to allow the defendant to attempt  
3 to represent himself would be a farce and a sham. So the motion is  
denied.

4 Id. at 13-14. Petitioner raised the issue on appeal from his conviction. The Court of Appeal  
5 rejected his claim:

6 Defendant contends that the trial court erred in basing its denial of  
7 the motion on the finding that his waiver was not knowing and  
8 intelligent. *Faretta* holds that a defendant has the right under the  
Sixth and Fourteenth Amendments to waive counsel and represent  
himself or herself.

9 The record is clear that the trial court believed that defendant  
10 would disrupt the court proceedings, and found that to allow him to  
11 represent himself “would be a farce and a sham.” Defendant  
12 asserts that the basis of the trial’s [sic] court’s ruling was that the  
defendant’s waiver was not knowing and intelligent. The court  
made its finding in the context of its grave concern that the  
defendant would continue to disrupt the proceedings.

13 This basis alone would suffice to support the trial court’s  
14 conclusion that defendant could not represent himself, and a ruling  
will be upheld if it was correct on any basis.

15 A defendant who chooses self-representation must be able and  
16 willing to abide by procedural rules and courtroom protocol. “The  
right of self-representation is not a license to abuse the dignity of  
the courtroom,” and self-representation may be terminated when a  
17 defendant engages in “serious and obstructionist misconduct.” The  
California Supreme Court has held that the trial court may deny a  
18 motion for self-representation if it has a reasonable basis for  
believing that self-representation will create a disruption. “Thus, a  
19 trial court must undertake the task of deciding whether a defendant  
is and will remain so disruptive, obstreperous, disobedient,  
20 disrespectful or obstructionist in his or her actions or words as to  
preclude the exercise of the right to self-representation.” The trial  
court’s decision to terminate a defendant’s right to self-  
representation is reviewed for abuse of discretion, and the *Welch*  
22 court held the same deference should be applied “when it comes to  
deciding whether a defendant’s motion for self-representation  
23 should be granted in the first instance.”

24 Our review of the record reveals numerous pretrial proceedings at  
25 which defendant was seriously disruptive. On one occasion he  
refused to leave his prison cell to appear for a readiness  
conference, and the court was forced to continue the conference.  
26 In addition to the incidents cited by the trial court in its ruling on

1 the *Faretta* motion, the defendant had physically lunged at his  
2 attorney and “head-butted” him, spit on the bailiff, used foul  
3 language, and refused to speak when addressed directly by the  
4 court. “We are also aware that the extent of a defendant’s  
5 disruptive behavior may not be fully evident from the cold record,  
6 and that one reason for according deference to the trial court is that  
7 it is in the best position to judge defendant’s demeanor. Thus  
8 while no single one of the above incidents may have been  
9 sufficient by itself to warrant a denial of the right of self-  
10 representation, taken together they amount to a reasonable basis for  
11 the trial court’s conclusion that defendant could or would not  
12 conform his conduct to the rules of procedure and courtroom  
13 protocol, and that his self-representation would be unacceptably  
14 disruptive.” There was no abuse of discretion in the trial court’s  
15 denial of the *Faretta* motion here.

16 Answer, Ex. A at 20-22.

17 Both courts’ observations of petitioner’s behavior is borne out by this court’s  
18 review of the record. The following incidents occurred before the court denied petitioner’s  
19 Faretta requests:

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- 21 • On April 12, 1999, the transcript reports that “the defendant makes  
22 physical contact with Mr. Moe [his lawyer at that time] and is restrained.”  
Before petitioner was removed from the holding cell, he said, “I’ll tell you  
right now, fool. This ain’t going down, mother fucker. It ain’t going  
down, punk.” He then yelled from the holding cell, “Hey, your ass is  
mine, Moe. Put that on the record.” 4/12/99 RT 5.
- 23 • On May 6, 1999, after an evaluation of petitioner’s competence to stand  
24 trial, petitioner interrupted the proceeding, prompting the court to ask, “Do  
we have any duct tape, gentlemen? Do you have something to gag him,  
because I’m not going to put up with this.” 5/6/99 RT 10.<sup>4</sup> Later in the  
25 same hearing, a Marsden hearing, the court described petitioner’s  
26 demeanor in this fashion: “He comes out of my holding cell acting like an  
animal. He hears me say to the correctional officer, “Do you have any  
duct tape. . . .” and he immediately stops. There’s nothing wrong with this  
gentleman. This is all feigned. . . . and if he thinks that he’s going to  
manipulate the legal system, it’s not going to happen.” Id. at 11. As the  
hearing continues, the court reporter noted petitioner “burping” and  
“making noises.” Id. at 12, 13. This prompted the court to direct  
petitioner to be put in the holding cell. Id. at 13.

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30 <sup>4</sup> The May 6, 1999 transcript immediately follows that of the proceedings on April 13,  
31 1999.

1                   • The minutes for petitioner's arraignment on August 19, 1999 note,  
2                   "Defendant became verbally + physically assaultive, he was removed from  
3                   the courtroom + placed into a holding cell adjacent to the courtroom." CT  
4                   15. During the sanity phase of the trial, correctional officer Pappa  
5                   described what had occurred: "I observed Mr. Diesso lunge toward his  
6                   attorney, Mr. Oldwin, and head-butt him on the left side of his face. And  
7                   after that, he was grabbed by the correctional staff and carried out of the  
8                   courtroom. And just prior to being carried out of the courtroom, he turned  
9                   and spat on the bailiff." RT 486.

6                   B. Analysis

7                   In Faretta, the Supreme Court held that a criminal defendant has a Sixth  
8                   Amendment right to represent himself at trial after a knowing and voluntary waiver of the right to  
9                   counsel and a trial court lacks discretion to deny a request so long as it is knowing, voluntary,  
10                   and timely. 422 U.S. at 835.

11                   In this case, petitioner argues that the trial court did not properly apply the Faretta  
12                   standards, for it found he was mentally competent to represent himself yet also found that he had  
13                   not validly waived his right to counsel. The Court of Appeal found that the denial was based not  
14                   on an invalid waiver, but on the potential for disruption if petitioner represented himself.

15                   In Hirschfield v. Payne, 420 F.3d 922 (9th Cir. 2005), the petitioner had made two  
16                   motions to represent himself. The first had been denied as made for the purpose of delay, while  
17                   the second was denied because the petitioner was unfamiliar with legal procedures. Id. at 927-  
18                   28. The Ninth Circuit found the first denial proper, but the second was not. It recognized that  
19                   had the second judge been aware of the prior ruling, he could have denied the second motion "on  
20                   the separate ground that it was intended to cause delay." Id. at 928. However, the court  
21                   recognized it could not deny habeas relief on the basis of "a hypothetical justification not actually  
22                   relied on by the trial court." Id. It refused to "posit[] an alternative reason for the state court's  
23                   decision . . . where the record reveals the state court did not base its decision on that alternative  
24                   reason." Id. at 929; see also Van Lynn v. Farmon, 347 F.3d 735, 741 (9th Cir. 2003), cert.  
25                   denied sub nom. Mitchell v. Van Lynn, 541 U.S. 1037 (2004) (refusing to uphold Faretta denial  
26                   on grounds of timeliness when state court had used lack of competence; court would not "invent

1 an alternative rationale for the state court's decision which requires application of an entirely  
2 different and unrelated legal principle" and then uphold the decision based on the alternative  
3 rationale).

4 This case is not like Hirschfield and Van Lynn. Although the trial court said  
5 petitioner had not validly waived his right to counsel, the Court of Appeal found that denial of  
6 the Fareta motion was made "in the context" of the potential for disruption and found the denial  
7 proper on that basis. The trial court did more than "initially express concern" about the potential  
8 for disruption; the focus of its explanation was on the earlier disruptions and the predictive value  
9 of those episodes. Accordingly, unlike Hirschfield and Van Lynn, this court need not "invent an  
10 alternative rationale for the state court's decision" and may analyze the denial in the context of  
11 petitioner's disruptive behavior.

12 The Fareta court observed:

13 We are told that many criminal defendants representing themselves  
14 may use the courtroom for deliberate disruption of their trials. But  
15 the right of self-representation has been recognized from our  
16 beginnings by federal law and by most of the States, and no such  
17 result has thereby occurred. Moreover, the trial judge may  
18 terminate self-representation by a defendant who deliberately  
19 engages in serious and obstructionist misconduct. See Illinois v.  
Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353. . . .

20 Fareta, at 834 n.46. Moreover, as the Court has observed, the "government's interest in ensuring  
21 the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his  
22 own lawyer." Martinez v. California, 528 U.S. 152, 162 (2000). The Fourth Circuit has  
23 explained:

24 A trial court must be permitted to distinguish between a  
25 manipulative effort to present particular arguments and a sincere  
desire to dispense with the benefits of counsel.

26 United States v. Frazier-El, 204 F.3d 553, 560 (4th Cir. 2000).

1           In this case, the court did not terminate petitioner's right to represent himself, but  
2 rather denied his request based on the potential for disruption of the proceedings. This is not an  
3 unreasonable application of clearly established federal law.

4           In United States v. Flewitt, 874 F.2d 669 (9th Cir. 1989), the court granted the  
5 defendants' requests to represent themselves in a federal mail fraud prosecution, but thereafter  
6 denied their repeated requests to be transported to a warehouse to inspect and categorize boxes of  
7 documents they claimed were relevant to their defense. At a status hearing a week before trial,  
8 defendants renewed their request. In response, the judge terminated their pro se status, finding  
9 that they had refused to prepare for trial and so were incapable of representing themselves. Id. at  
10 672. The Ninth Circuit reversed:

11           Pretrial activity is relevant only if it affords a strong indication that  
12 the defendants will disrupt the proceedings in the courtroom. The  
13 Supreme Court never suggested that the defendant's right to self-  
14 representation could be terminated for failure to prepare properly  
for trial. Rather, it stated that [t]he right of self-representation is  
not a license to abuse the dignity of the courtroom.

15 Id. at 674 (internal quotations omitted).

16           In United States v. Brock, 159 F.3d 1077, 1079 (7th Cir. 1998), the court  
17 terminated the defendant's pro se status before trial after he repeatedly refused to answer the  
18 court's questions, challenged the court's jurisdiction, and demanded a bill of particulars. He  
19 challenged this ruling on appeal. The Seventh Circuit upheld the conviction:

20           [W]hen a defendant's obstreperous behavior is so disruptive that  
21 the trial cannot move forward, it is within the trial judge's  
discretion to require the defendant to be represented by counsel.

22 Id. at 1079. The court acknowledged the Ninth Circuit's decision in Flewitt, but noted:

23           In Flewitt, the defendants' conduct merely affected the defendants'  
24 chance of prevailing at trial; it did not prevent the trial from  
25 proceeding. In contrast, Brock's steadfast refusal to answer the  
26 court's questions made it extremely difficult for the court to  
resolve threshold issues, such as whether the defendant would be  
represented by counsel. Brock did not simply refuse to prepare for  
trial, he refused to cooperate, even minimally, with the court.

1 Furthermore, Brock's obstructionist conduct persisted even after  
2 several contempt citations. It was, therefore, reasonable for the  
3 trial court to conclude that Brock's behavior strongly indicated that  
4 he would continue to be disruptive at trial.

5 Id. at 1080-81 (footnote omitted).

6 As Brock and Flewitt recognize, when pretrial behavior strongly indicates that a  
7 defendant will be disruptive at trial, a court is justified in revoking that defendant's pro se status  
8 before trial. Nothing in these cases, or in Faretta itself, suggests that a trial judge must first  
9 permit a defendant to proceed pro se before relying on the predictive power of his prior behavior  
10 to determine that the pro se defendant would disrupt the trial.

11 In Marshall v. Taylor, 395 F.3d 1058 (9th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 126  
12 S.Ct. 139 (2005), the Ninth Circuit considered the interaction between state and federal rulings  
13 concerning the timeliness of a Faretta request. It noted:

14 The only definitive source of clearly established federal law under  
15 28 U.S.C. § 2254(d) is Supreme Court precedent existing at the  
16 time of the state court's decision. Supreme Court precedent  
17 includes not only bright-line rules it establishes but also the legal  
18 principles and standards flowing from them.

19 Id. at 1060. The court noted that Supreme Court guidance on "the permissible timing of a Faretta  
20 request is scarce," and concluded:

21 Because the Supreme Court has not clearly established when a  
22 Faretta request is untimely, other courts are free to do so as long as  
23 their standards comport with the Supreme Court's holding that a  
24 request "weeks before trial" is timely.

25 Id. at 1061.

26 This case is similar, in that Supreme Court precedent on the question of when a  
disruptive defendant's request to represent himself may be revoked or denied is scarce. The  
California Supreme Court has concluded that "the same rule" concerning the termination of the  
right of self-representation of an obstructionist defendant

////

1 applies to the denial of a motion for self-representation in the first  
2 instance when a defendant's conduct prior to the *Faretta* motion  
3 gives the trial court a reasonable basis for believing that his self-  
representation will create disruption.

4 People v. Welch, 20 Cal.4th 701, 735 (1999). The Court of Appeal relied on Welch in reaching  
5 its decision in this case. Answer, Ex. A at 21.

6 The Welch court's holding comports with Faretta and with Brock and Flewitt's  
7 recognition of the predictive value of pretrial behavior. The Court of Appeal's determination  
8 therefore is neither contrary to nor an unreasonable application of the "principles and standards"  
9 flowing from Faretta. Moreover, the court did not make an unreasonable factual determination  
10 by relying on petitioner's earlier disruptions as establishing the "strong indication" that he would  
11 use his pro se status to continue his obstructionist behavior. The record shows his disruptions  
12 were serious and continued even after he was removed from the courtroom. There was no  
13 federal constitutional error.

14 **IV. Jury Instruction On Mental State**

15 In California, "all murder which is perpetrated by means of . . . lying in wait" or is  
16 "willful, deliberate, and premeditated" is first degree murder. Cal. Pen. Code § 189. In this case,  
17 the prosecutor proceeded on these two theories in pursuing the first degree murder charge against  
18 petitioner. See RT 336-338.

19 Petitioner argues that CALJIC No. 3.32, the jury instruction on mental state, failed  
20 to inform the jury it could consider evidence of petitioner's mental illness in determining the  
21 mental state of lying in wait and did not make it clear to the jurors that evidence of petitioner's  
22 mental illness need only raise a reasonable doubt as to the existence of the required mental states.

23 The trial court instructed the jury:

24 You have received evidence regarding a mental disease, mental  
25 defect or mental disorder of the defendant at the time of the  
26 commission of the crime charged, namely, murder in Count 1 or  
lesser crimes thereto, namely, murder in the second degree and  
voluntary manslaughter. You should consider this evidence solely

1 for the purpose of determining whether the defendant actually  
2 formed the specific intent, premeditated, deliberated or harbored  
3 malice aforethought, which are elements of the crime charged in  
4 Count 1, namely murder.

5 RT 385. The Court of Appeal rejected petitioner's challenge:

6 Lying in wait is one form of deliberate and premeditated murder.  
7 A showing of lying in wait obviates the necessity of separately  
8 proving premeditation and deliberation. In other words, lying in  
9 wait is the functional equivalent of proof of a premeditated,  
10 deliberate intent to kill.

11 The jury was first instructed with CALJIC No. 8.25, which was  
12 given without modification. It defined the state of mind for lying  
13 in wait as "equivalent to premeditation and deliberation." . . .<sup>5</sup> The  
14 jury was then instructed with CALJIC No. 3.32, as modified by the  
15 court. CALJIC No. 3.32 instructed the jury that it could consider  
16 defendant's mental state in determining whether he premeditated or  
17 deliberated. The jury also received the standard instruction that as  
18 to the murder charge, "there must exist a union or joint operation  
19 of act or conduct and a certain mental state in the mind of the  
20 perpetrator. Unless this mental state exists the crime to which it  
21 relates is not committed." Together, these instructions advised the  
22 jury that defendant's mental disorder was relevant to its  
23 consideration of whether he had the required mental state for  
24 murder; because lying in wait is equivalent to premeditation,  
25 CALJIC No. 3.32 necessarily included it in the mental states as to  
which defendant's mental disorder could be considered.

17 . . . . .  
18 . . . . .  
19 Defendant further faults the instruction on the basis that it failed to  
20 make clear that the evidence of mental defect "need only be

21 <sup>5</sup> The 8.25 instruction as given read:

22 Murder which is immediately preceded by lying in wait is murder  
23 of the first degree. The term lying in wait is defined as a waiting  
24 and watching for an opportune time to act, together with a  
25 concealment by ambush or by some other secret design to take the  
other person by surprise, even though the victim is aware of the  
murderer's presence. The lying in wait need not continue for any  
particular period of time, provided that its duration is such as to  
show a state of mind equivalent to premeditation or deliberation.

1 capable of raising a reasonable doubt about the existence of the  
2 required mental states,” thereby depriving defendant of his  
3 constitutional right to require that every element of his crime be  
4 proved beyond a reasonable doubt. We disagree. The jury was  
5 instructed that the prosecution’s burden was to prove the case  
6 beyond a reasonable doubt and, specifically, that each piece of  
7 prosecution evidence must be proved beyond a reasonable doubt.  
8 Defense counsel argued reasonable doubt in his closing, including  
9 a specific argument that the jury must be convinced beyond a  
10 reasonable doubt that defendant had the requisite intent for the  
11 crimes. The burden was clear.

12 Here the question is whether there is a reasonable likelihood that  
13 the jury understood the charge as the defendant asserts. (*People v.*  
14 *Kelly* (1992) 1 Cal.4th 496, 525, quoting *Estelle v. McGuire* (1991)  
15 502 U.S. 62, 72-73 & fn. 4.) We conclude there is no reasonable  
16 likelihood that the jury understood it could not apply the evidence  
17 of mental disorder to the lying in wait instruction, or understood  
18 the instruction to abrogate the prosecution’s burden of proof.

19 Answer, Ex. A at 17-20 (internal quotations and most citations omitted).

20 A challenge to jury instructions does not generally state a federal constitutional  
21 claim. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456  
22 U.S. 107, 119 (1982)). In order to warrant federal habeas relief, a challenged jury instruction  
23 cannot be merely “undesirable, erroneous, or even universally condemned, but must violate some  
24 due process right guaranteed by the fourteenth amendment.” Cupp v. Naughten, 414 U.S. 141,  
25 146 (1973). Moreover, “not every ambiguity, inconsistency, or deficiency in a jury instruction  
26 rises to the level of a due process violation.” Middleton v. McNeil, 541 U.S. 433, 437 (2004).  
An ambiguous jury instruction creates constitutional error if “there is a reasonable likelihood that  
the jury has applied the challenged instruction in a way that prevents the consideration of  
constitutionally relevant evidence,” or otherwise “in a way that violates the Constitution.” Boyd  
v. California, 494 U.S. 370, 380 (1990) (instruction on mitigating evidence in a capital case);  
Estelle v. McGuire, 502 U.S. 62, 72 (1991) (adopting Boyd test for other challenges to  
ambiguous jury instructions). In making this determination, a single instruction “may not be  
judged in artificial isolation, but must be viewed in the context of the overall charge.” Boyd,  
494 U.S. at 378.

1 /////

2           A. Mental State Evidence And Lying In Wait

3           In California, evidence of a defendant's mental illness, defect or disorder is  
4 admissible "on the issue of whether or not the accused actually formed a required specific intent,  
5 premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is  
6 charged." Cal. Pen. Code § 28(a). Petitioner presented such evidence in the guilt phase and the  
7 jury was instructed to consider it "solely" when evaluating whether he "actually formed the  
8 specific intent, premeditated, deliberated or harbored malice aforethought." RT 385. Petitioner  
9 argues the use of the word "solely" and the failure to list lying in wait as one of the mental states  
10 covered by the instruction prevented the jury from considering the evidence of petitioner's  
11 mental state when evaluating whether he was guilty of first degree murder on a theory of lying in  
12 wait.

13           As the Court of Appeal noted and the jury in this case was instructed, proof of  
14 lying in wait "acts as the functional equivalent of proof of premeditation, deliberation and intent  
15 to kill." See People v. Ruiz, 44 Cal.3d 589, 614 (1988). An equivalent is something "having  
16 equal or corresponding import, meaning, or significance: chiefly of words and expressions," or  
17 "that is virtually the same thing; identical in effect; tantamount." Oxford English Dictionary  
18 Online at <<http://dictionary.oed.com>> (accessed 8/21/06). Accordingly, the jury was told to  
19 consider the evidence of petitioner's mental illness solely in connection with its determination  
20 whether petitioner possessed the necessary mental states of premeditation and deliberation and  
21 was told that lying in wait was "of equal meaning" and "virtually the same thing" as  
22 premeditation. Given the equivalence of the terms, the use of the word "solely" in CALJIC No.  
23 3.32 did not prevent the jury from considering the evidence of petitioner's mental illness in  
24 connection with the theory of lying in wait. The Court of Appeal's decision did not unreasonably  
25 apply clearly established federal law.

26 /////

1 /////

2 **B. Raising A Reasonable Doubt**

3 Petitioner argues that the instruction failed to inform the jury that his evidence of  
4 mental illness could be the basis of a different verdict if it merely raised a reasonable doubt about  
5 whether the prosecution had met its burden and that this deprived him of his right to hold the  
6 prosecution to its burden of proving every element beyond a reasonable doubt.

7 The “clearly established federal law” against which this claim must be measured  
8 is In re Winship, 397 U.S. 358 (1970), which recognized that the due process clause requires  
9 “proof beyond a reasonable doubt” of every element necessary to a finding of guilt. A jury  
10 instruction that, in context, fails to give effect to that requirement violates a defendant’s  
11 constitutional rights. Bruce v. Terhune, 376 F.3d 950, 955 (9th Cir. 2004). However, as with  
12 most claims of jury instructional error, this claim must be evaluated in the context of the  
13 instructions as a whole. Boyd, 494 U.S. at 378.

14 Here, the jury was instructed that

15 each fact which is essential to complete a set of circumstances  
16 necessary to establish the defendant’s guilt must be proved beyond  
17 a reasonable doubt. In other words, before an inference essential to  
establish guilt may be found to have been proved beyond a  
reasonable doubt, each fact or circumstance on which the inference  
necessarily rests must be proved beyond a reasonable doubt.

19 .....

20 .....

21 A defendant in a criminal action is presumed to be innocent until  
22 the contrary is proved, and in case of a reasonable doubt whether  
23 his guilt is satisfactorily shown, he is entitled to a verdict of not  
24 guilty. This presumption places upon the People the burden of  
25 proving him guilty beyond a reasonable doubt.

26 .....

27 In the crime charged in Count 1... there must exist a union or joint  
28 operation of act or conduct and a certain specific intent in the mind  
29 of the perpetrator. Unless this specific intent exists, the crime to  
30 which it relates is not committed.

1 .....  
2 In the crime charged in Count 1 . . . there must exist a union or joint  
3 operation of act or conduct and a certain mental state in the mind  
4 of the perpetrator. Unless this mental state exists, the crime to  
5 which it relates is not committed.

6 RT 369, 378, 379; CT 362, 381, 382, 383. These instructions informed the jury of the  
7 prosecution's burden in general and on the issues of intent and mental state. The Court of  
8 Appeal did not apply federal law in an unreasonable fashion in rejecting this claim of error.

9 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a  
10 writ of habeas corpus be denied.

11 These findings and recommendations are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
13 days after being served with these findings and recommendations, any party may file written  
14 objections with the court and serve a copy on all parties. Such a document should be captioned  
15 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
16 shall be served and filed within ten days after service of the objections. The parties are advised  
17 that failure to file objections within the specified time may waive the right to appeal the District  
18 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19  
20 DATED: August 22, 2006.  
21  
22

23  
24   
25 UNITED STATES MAGISTRATE JUDGE  
26